

FCPA Actions in China and China’s Anti-Bribery Law

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INTRODUCTION

In recent decades, the United States Department of Justice (DOJ) has greatly improved its enforcement of the U.S. Foreign Corrupt Practices Act (FCPA).¹ Some of these FCPA enforcement cases involve China.² Given

1. In 2000, the DOJ did not prosecute any FCPA violations. U.S. DEP’T OF JUSTICE, *FCPA and Related Enforcement Actions: Chronological List, 2000*, (last updated June 16, 2015), <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2000> [<https://perma.cc/X3U4-ERGU>]. In 2015, the DOJ prosecuted fifteen violations. U.S. DEP’T OF JUSTICE, *FCPA and Related Enforcement Actions: Chronological List, 2015*, (last updated May 30, 2018), <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2015> [<https://perma.cc/FR9R-5XNL>]. In 2016, the number of prosecutions jumped to thirty-two. U.S. DEP’T OF JUSTICE, *FCPA and Related Enforcement Actions: Chronological List, 2016* (last updated May 18, 2018), <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2016> [<https://perma.cc/8AYT-ZRU2>]. In 2017, the DOJ prosecuted thirty-six violations. U.S. DEP’T OF JUSTICE, *FCPA and Related Enforcement Actions: Chronological List, 2017* (last updated May 30, 2019), <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017> [<https://perma.cc/CS9X-J6YP>].

2. See SHEARMAN & STERLING LLP, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* i, ii, viii (Jan. 2017), <https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/01/FCPA-Digest—January-2017—050217.pdf?la=en&hash=DC2607C9DD46543A437466FB777343EA89379DD5>.

China's prominence as a center of global business, this trend is likely to increase in the foreseeable future.

Section I of this Article briefly reviews the provisions of the FCPA, and recent FCPA enforcement in China. Section II discusses China's anti-bribery law regime, anti-bribery provisions and agencies enforcing bribery and corruption. Section III focuses on an analysis of FCPA cases involving China, in addition to describing the business culture and the economic system in China. The differences between China's anti-bribery laws and the FCPA explain the existence for a wide array of potential FCPA violations. Section IV recommends that China make widespread changes by establishing clear rules, publishing anti-bribery practice guides, and by building up international cooperation with other countries.

I. THE FCPA IN GENERAL

U.S. Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977³ after a series of scandals in which hundreds of U.S. companies paid millions of dollars in bribes to secure business from foreign officials.⁴ Congress amended the FCPA twice: once in 1988 to add affirmative defenses,⁵ and once in 1998 to comply with the OECD Anti-Bribery Convention's requirement to include bribery of foreign nationals.⁶ Generally, the FCPA consists of anti-bribery provisions which prohibit offering bribes and accounting provisions.⁷

A. Anti-Bribery Provisions Under the FCPA

The FCPA anti-bribery provisions prohibit offer, payment, promise to pay, or authorization of payment of anything of value to any foreign official, foreign political party, official, or candidate, in order to obtain or retain

3. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (LexisNexis 2006 & Supp. 2010)).

4. CRIMINAL DIV. OF DEP'T OF JUSTICE & ENF'T DIV. OF SEC. AND EXCH. COMM'N, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 2-3 (Nov. 14, 2012) [hereinafter FCPA Resource Guide], <https://www.justice.gov/iso/opa/resources/2952012114101438198031.pdf> [<https://perma.cc/HP4K-PJUU>].

5. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1424.

6. Int'l Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 1-6, 112 Stat. 3302.

7. See generally Foreign Corrupt Practices Act of 1977 and 1988 Amendments.

business.⁸ These provisions apply to issuers,⁹ their employees, U.S. persons and businesses (“domestic concerns”),¹⁰ and certain foreign persons or businesses.¹¹ Whenever issuers or domestic concerns use interstate commerce to make a payment to foreign officials, their conduct is governed by the FCPA, regardless of whether it occurs within the United States or abroad.¹² Entities other than issuers or domestic concerns that directly or indirectly engage in any act in furtherance of a corrupt payment while in the United States are also covered by the FCPA.¹³

Under the FCPA, it is unlawful to:

1. make use of interstate commerce,
2. corruptly,
3. in furtherance of an offer of anything of value,
4. to (a) a foreign official, (b) a foreign political party, party official, or candidate for office or (c) to any person while knowing that all or any portion of such thing of value will be offered or given to a foreign official, political party or candidate,
5. for the purpose of inducing a foreign official to use his influence to affect any act or decision of his government or governmental instrumentality, or to secure any improper advantage,
6. in order to obtain or retain business, or direct business to any person.¹⁴

B. Accounting Provisions Under the FCPA

FCPA accounting provisions require companies to make annual reports, keep accurate records of their transactions, and create internal accounting controls.¹⁵ These provisions apply to issuers, domestic and foreign companies listed on any U.S. stock exchange, or those required to file reports with

8. 15 U.S.C. § 78dd-3(a).

9. § 78dd-1(a) (defining this group as including domestic and foreign companies listed on any U.S. stock exchange or which are required to file reports with the U.S. Securities and Exchange Commission).

10. § 78dd-2(h)(1) (including any individual who is a U.S. citizen, national, or resident and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, which has its principal place of business in the United States, or which is organized under U.S. laws).

11. § 78dd-3(f)(1).

12. § 78dd-2(h)(5).

13. § 78dd-3(a).

14. RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 907–08 (Kluwer L. Int’l., 2000) (citing 15 U.S.C. §§ 78dd-1(a), (2)(a)).

15. § 78m(a), (b) (2006).

the U.S. Securities and Exchange Commission (SEC).¹⁶ The accounting provisions ensure that all public companies account for all of their assets and liabilities accurately and in reasonable detail.¹⁷

The FCPA books and records provision requires all issuers to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”¹⁸ The reasonable detail standard is one that would “satisfy prudent officials in the conduct of their own affairs” and it balances numerous relevant factors, including the cost of compliance.¹⁹

The record-keeping and internal controls provision also ensures that a company properly uses its assets, encourages accurate recording of improper payments, and prevents the mischaracterization of transactions.²⁰ The internal controls provision requires issuers to create internal controls that reasonably ensure the accurate execution and recording of transactions.²¹ Companies have the discretion to develop their own controls to meet their particular needs and circumstances, but they must take into consideration the realities and risks associated with their respective businesses.²²

C. FCPA Enforcements in China

Recent FCPA enforcement efforts have focused on multinational companies (MNCs) that conduct businesses in China. In 2010, the SEC filed a complaint against RAE Systems Inc. alleging that two joint venture entities in China violated the FCPA by furnishing luxury gifts such as jade jewelry, fur coats, and high priced liquor to government officials in order to obtain or retain business.²³ In December 2014, Avon paid \$135 million to resolve FCPA charges alleging that its China subsidiary made \$8 million worth of payments in cash, gifts, travel, and entertainment to various Chinese officials in exchange

16. See § 78m (the provision applies to “[e]very issuer which has a class of securities registered pursuant to section 781 of this title and every issuer which is required to file reports pursuant to section 78o(d)”).

17. FCPA Resource Guide, *supra* note 4, at 38.

18. § 78m(b)(2)(A).

19. FCPA Resource Guide, *supra* note 4, at 39.

20. *Id.* at 40.

21. § 78m(b)(2)(B).

22. FCPA Resource Guide, *supra* note 4, at 40.

23. Complaint at 8, SEC v. Rae Systems Inc., No. 1:10-cv-02093 (D.C. Dec. 10, 2010), <https://www.sec.gov/litigation/complaints/2010/comp21770.pdf> [<https://perma.cc/UH75-CYUP>].

for obtaining direct selling licenses in China.²⁴ In July 2015, Mead Johnson paid \$12 million to settle FCPA-related charges alleging that its China unit paid \$2 million in bribes to healthcare professionals at state-owned hospitals.²⁵

In the battle against corruption and bribery, 2016 was defined in large part by one country and one industry: China and healthcare/life sciences. Of the twenty-seven enforcement actions in 2016—corporate and individual combined—thirteen involved alleged acts of bribery in China.²⁶ While SEC and FCPA enforcements have prominently targeted China in past years, 2016 is unique because no other country has been the target of such a significant portion of FCPA enforcement actions. As of 2017, China had experienced the greatest number of FCPA enforcement actions—89 from 1978 to 2017.²⁷ In 2018, five corporate FCPA enforcement actions resulted in more than \$162.2 million in penalties paid to the DOJ and to the SEC to resolve FCPA offenses in China.²⁸ “[A]mong the anti-corruption developments in Asia, ‘China presently stands out as the most important and active jurisdiction,’” given the high amount of FCPA-related activities in China.²⁹

In 2017, China ranked 77th of 180 countries and territories in the Transparency International’s Corruption Perceptions Index—scoring 41 points.³⁰ The average score in the Asia Pacific region was 44.³¹ The index

24. Press Release, U.S. Sec. and Exch. Comm’n, SEC Charges Avon with FCPA Violations (Dec. 17, 2014) (on file with author), <https://www.sec.gov/news/pressrelease/2014-285.html> [<https://perma.cc/2WRY-XCRE>].

25. Press Release, U.S. Sec. and Exch. Comm’n, SEC Charges Mead Johnson Nutrition with FCPA Violations (Jul. 28, 2015) (on file with author), <https://www.sec.gov/news/pressrelease/2015-154.html> [<https://perma.cc/52X5-NECC>].

26. See U.S. SEC. AND EXCH. COMM’N ENFORCEMENT ACTIONS: FCPA CASES (2019), <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [<https://perma.cc/8J3C-JBLQ>] (listing SEC enforcement actions since 2010, and listing actions against General Cable Corporation, GlaxoSmithKline, Nu Skin Enterprises, Jun Ping Zhang, AstraZeneca, Johnson Controls, Akamai Technologies, Nortek, Las Vegas Sands, Novartis AG, Qualcomm, PTC, SciClone Pharmaceuticals involving China or Chinese officials).

27. Gibson, Dunn & Crutcher LLP, 2017 Year-End FCPA Update 5 (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update/> [<https://perma.cc/5CQD-G2TB>].

28. See Richard L. Cassin, *2018 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 2, 2019, 7:28 AM), <http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html> [<https://perma.cc/69DJ-LE3M>].

29. Yin Wilczek, *Anti-Bribery Trends in 2015 to Include Continuing SEC Aggressiveness, Panelists Say*, BLOOMBERG BNA (Jan. 15, 2015), <http://www.bna.com/2015-antibribery-trends-n17179922157> [<https://perma.cc/7VAF-VLAB>].

30. See *Corruption Perceptions Index 2017*, TRANSPARENCY INTERNATIONAL (Feb. 2, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017 [<https://perma.cc/9EZZ-DE36>].

31. *Id.*

uses “a scale of 0 to 100, where 100 means very clean and 0 reflects a deep-rooted, systemic corruption problem”³²

II. OVERVIEW OF THE CHINESE ANTI-BRIBERY LAW FRAMEWORK

China enacted its modern criminal law in 1979³³ after the end of the Cultural Revolution.³⁴ It has since been amended nine times.³⁵ China ratified the United Nations Convention against Corruption (UNCAC) in 2006³⁶ in an aggressive step to manage its overwhelming problem with corruption. In 2011, the National People’s Congress of China amended China’s criminal laws to prohibit bribery of foreign officials and now bribery is codified under eight articles in Section 8³⁷ of the Criminal Law of the People’s Republic of China. China’s Anti-Unfair Competition Law (AUCL) also imposes administrative penalties on unfair competition, including commercial bribery.³⁸ The bribery provisions and the AUCL constitute the anti-bribery laws of China. This section discusses the framework of the anti-bribery laws in detail.

32. *Id.*

33. *See generally* U.S Congressional-Executive Commission on China, Criminal Law of the People’s Republic of China, <https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> [<https://perma.cc/KQ9F-PWD6>] (last visited Nov. 8, 2019) (providing an official translation of the law into English).

34. *See Cultural Revolution*, WIKIPEDIA https://en.wikipedia.org/wiki/Cultural_Revolution [<https://perma.cc/C58V-VHLE>].

35. *Id.*

36. United Nations Office on Drugs and Crimes, Signature and Ratification, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> [<https://perma.cc/8L9V-83C5>] (last visited Nov. 8, 2019).

37. Zhonghua Renmin GongheguoXingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the President of the People’s Republic of China, July 1, 1979, amended Mar. 14, 1997, effective Oct. 1, 1997, amended Dec. 25, 1999, amended Aug. 31, 2001, amended Dec. 29, 2001, amended Dec. 28, 2002, amended Feb. 28, 2005, amended June 29, 2006, amended Feb. 28, 2009, amended Feb. 25, 2011, effective May 1, 2011), arts. 163–64, 385, 387, 389, 391–93 [hereinafter Chinese criminal law]. The U.S Congressional-Executive Commission on China’s website provides an official translation of the law and of its amendments, *see supra* note 33.

38. *See generally* PRC Anti-Unfair Competition Law [Anti-Unfair Competition Law of the People’s Republic of China] (revised and adopted by Standing Comm. Nat’l People’s Cong., Nov. 4, 2017, effective Jan. 1, 2018) 2017 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., [hereinafter AUCL].

A. Anti-Bribery Law Framework

In China, there are two sets of laws related to bribery: one set of laws involves the bribery of state officials,³⁹ and the other applies to commercial bribery, i.e. between private individuals.⁴⁰ Specifically, Article 395 of Chinese criminal law criminalizes bribery of state officials and is known as public sector bribery,⁴¹ while Article 163 of Chinese criminal law⁴² and Article 7 of the AUCL⁴³ regulate commercial bribery. In response to increasing corruption in the early 21st century, the Supreme People's Court (SPC)⁴⁴ and the Supreme People's Procuratorate (SPP)⁴⁵ jointly issued the following opinions to provide further guidance on adjudicating criminal bribery cases: "Several Issues Concerning the Application of Law in the Handling of Criminal Case of Graft and Bribes,"⁴⁶ "Interpretation of Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Bribery,"⁴⁷ and

39. See *infra* note 41.

40. See *infra* notes 42, 43.

41. Chinese criminal law, art. 389 (An act of giving state personnel article of property in order to seek illegitimate gain shall be considered a crime of offering bribes. In economic activities, whoever gives articles of property to state personnel in violation of state provisions, when the amount is fairly large, or gives a kickback or service charges of various types to state personnel in violation of state provisions is to be dealt with as committing the crime of offering bribes.).

42. Chinese criminal law, art. 163 (Where any of the employees of any company or enterprise or any other entity exerts any property by taking advantage of his position or accepts any money or property of any other person so as to seek any benefits for such person, and if the amount is considerably large, he shall be sentenced to fixed-term imprisonment of not more than five years or detention. If the amount is huge, he shall be sentenced to fixed-term imprisonment of less than five years, and his properties may be confiscated.).

43. AUCL, art. 7 (A business shall not seek transaction opportunities or competitive edges by bribing the following entities or individuals with property or by any other means: (1) An employee of the other party to a transaction; (2) The entity or individual authorized by the other party to a transaction to handle relevant affairs; (3) An entity or an individual that uses power or influence to affect a transaction.).

44. The Supreme People's Court is the highest judicial court in China.

45. The Supreme People's Procuratorate is the highest agency in China that exercises and supervises prosecutorial authority at all state and local levels.

46. *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Graft and Bribery*, COVINGTON & BURLING LLP, https://www.cov.com/-/media/files/corporate/publications/2016/04/judicial_interpretation_on_bribery_2016_04_cn_en.pdf (last visited Nov. 8, 2019) [<https://perma.cc/3M9U-5ZS9>].

47. Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Hang Hui XingshiAnjianJutiYingyongFaluruoganWenti de Jieshi(最高人民法院最高人民检察院关于办理行贿刑事案件具体应用法律若干问题的解释) [The Interpretation of the Sup. People's Ct. and the Sup. People's Proc. of Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases] (promulgated by the Sup. People's Ct. and the Sup. People's Proc., Dec. 26, 2012, effective Jan. 1, 2013), *translated in Interpretation of Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Bribery*, THE SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S

“Interpretation of Several Issues Concerning the Application of Laws in Handling Criminal Cases of Corruption and Bribery.”⁴⁸

1. Public Sector Bribery

Public sector bribery exists when the recipient of a bribe is serving, or was serving, as a state personnel or has a close connection to someone who is, or was, serving as state personnel (it thus relates to both current and former employees).⁴⁹ The list of acts constituting public sector bribery offenses is broader than that of commercial bribery.⁵⁰ The penalties are also more serious, including the death penalty for officials who accept a bribe in the most serious cases.⁵¹

2. Commercial Bribery

Commercial bribery exists when private parties give or receive bribes for business purposes, and where non-state personnel, for instance those who work in state-owned entities (SOEs), are involved.⁵² Giving or receiving a commercial bribe is illegal, but acting as an intermediary in commercial bribery is not; yet, actions that cannot be criminally prosecuted may still incur administrative liability within the AUCL.⁵³

3. Overseas Bribery

Overseas bribery includes bribing foreign officials or international public organizations’ officials.⁵⁴ Chinese companies or individuals break

REPUBLIC OF CHINA (last visited Aug. 31, 2019), <http://www.spp.gov.cn> [<https://perma.cc/B52H-6QKM>]; *Interpretation of Several Issues Concerning the Application of Law in Handling Corruption and Bribery Criminal Cases*, THE SUPREME PEOPLE’S PROCURATORATE OF THE PEOPLE’S REPUBLIC OF CHINA (last visited Aug. 31, 2019), <https://www.spp.gov.cn>.

48. *Id.*

49. Chinese criminal law, art. 390A (prohibiting bribing former state personnel (including retired employees) or close connection (that is, a family member or other close connection) of serving or former state personnel).

50. Compare Chinese criminal law, art. 163 (commercial bribery), with Chinese criminal law, art. 395 (public sector bribery).

51. *Id.* art. 383.

52. See *infra* Section III.C.

53. See generally AUCL, *supra* note 38.

54. Chinese criminal law, art. 164 (Whoever gives any property to a personnel of a foreign country or an official of an international public organization for any improper commercial benefit shall be punished according to the provision of the preceding paragraph.).

the law when giving an overseas bribe seeking or intending to gain improper commercial benefits, the punishment for commercial and overseas bribery is the same and only applies to the party that provides the bribe.⁵⁵

B. Anti-Bribery Provisions Under the Chinese Criminal Law

These anti-bribery provisions prohibit state personnel,⁵⁶ SOEs, non-state entities, and employees from taking advantage of their positions to demand bribes or to accept bribes to secure benefits for the briber.⁵⁷ The provisions also prohibit individuals from receiving illegitimate benefits by giving bribes to state personnel, SOEs, nonstate entities, and employees or from receiving improper commercial benefits through bribes to foreign personnel or international public organizations officials.⁵⁸ Furthermore, individuals may not give or accept rebates or service charges while conducting economic activities.⁵⁹

Criminal penalties for parties accepting bribes—the demand side—are generally harsher than penalties for parties giving bribes—the supply side—within Chinese criminal law.⁶⁰ Individuals who accept bribes may be sanctioned with fines, criminal detention, fixed-term imprisonment, confiscation of property, and—in the most serious circumstances—the death penalty.⁶¹ SOEs and companies convicted of bribery are subject to fines, and the employees who are directly responsible for the crime are subject to fixed-term imprisonment or criminal detention.⁶² The SPC and SPP have clarified and expanded upon bribery enforcement, focusing on the penalties for bribe-givers.⁶³

Currently, there are no accounting provision in Chinese criminal law similar to those under the FCPA.⁶⁴ Criminal charges are the principal means

55. *Id.*

56. *Id.* art. 93 (Personnel engaged in public service in state-owned corporations, enterprises, institutions, and people's organizations; and personnel which state organs, state-owned corporations, enterprises, and institutions assign to engage in public service in non-state owned corporations, enterprises, institutions, and social organizations; as well as other working personnel engaged in public service according to the law, are to be treated as state personnel.).

57. *Id.* arts. 163, 385–88; AUCL, *supra* note 38, art. 7.

58. Chinese criminal law, arts. 163–64, 389–93; AUCL, *supra* note 38, art. 8.

59. Chinese criminal law, arts. 163, 387, 389, 391, 393; AUCL, *supra* note 38, art. 8.

60. Chinese criminal law, arts. 163, 387, 389, 391, 393.

61. *Id.* arts. 163–64, 382–383, 386.

62. *Id.* art. 387.

63. The Supreme People's Procuratorate of the People's Republic of China's Interpretations, *supra* note 47.

64. *Id.*

of enforcing anticorruption laws.⁶⁵ Moreover, China heavily focuses on the demand side while it ignores the supply side of bribery.⁶⁶

C. Enforcement Agencies for Bribery and Corruption

On March 20, 2018, the National People's Congress (NPC) of China adopted the People's Republic of China (PRC) Supervision Law (SL).⁶⁷ The SL established a new state supervisory committee (SSC) at each administrative level, which oversees public officials.⁶⁸ The SL merged the powers of the central commission for discipline inspection (CCDI) of the Chinese Communist Party, the Ministry of Supervision, the National Bureau of Corruption Prevention (NBCP) and the Ministry of Public Security to investigate officials' corruption.⁶⁹ SSC became the most efficient investigation agency in China against corruption of Chinese public officials.⁷⁰

Public officials are broadly defined under the SL and include government officials, managers of SOEs, and personnel engaged in management of public entities.⁷¹ Practically speaking, this means that the anti-corruption campaign,⁷² which up to now focused on members of the Communist Party, will be expanded to include all civil servants and state-owned enterprises.⁷³ One of the major functions of the SSC is to conduct anti-corruption work, including supervision, investigation, and disposition,⁷⁴ providing suggestions for future supervision, or transferring investigation results to the procuratorate to review or prosecute.⁷⁵

65. *Id.*

66. *Id.*

67. Zhonghua Ren Min Gongheguo Jiancha Fa (中华人民共和国监察法) [Supervision Law of the People's Republic of China] (promulgated by National People's Cong., Mar. 20, 2018, effective Mar. 30, 2018), art. 5.

68. *Id.*

69. *Id.* art. 15 (describing the relevant personnel and functions encompassed within the scope and jurisdiction of the supervision law); Jamie P. Horsley, *What's so controversial about China's new anti-corruption body?*, BROOKINGS (May 30, 2018), <https://www.brookings.edu/opinions/whats-so-controversial-about-chinas-new-anti-corruption-body/> [<https://perma.cc/YA7D-RAE9>].

70. Horsley, *supra* note 69.

71. Supervision Law, *supra* note 67, art. 12.

72. Since China's current president, Xi Jinping, launched his anti-corruption campaign in late 2012, the country has seen unprecedented targeting of government officials.

73. Supervision Law, *supra* note 67, art. 12.

74. *Id.* art. 15.

75. *Id.* art. 18.

Until the adoption of the SL, several Chinese government agencies were responsible for enforcing compliance with China's bribery and corruption laws, including the Supreme People's Procuratorate (SPP)⁷⁶ and its local counterparts, referred to as the Local People's Procuratorate; the Supreme People's Court (SPC)⁷⁷ and its local counterparts, referred to as the Local People's Court; the State Supervisory Committee (SSC) and its local counterparts, referred to as the Local SSCs; and the State Administration for Industry and Commerce (SAIC)⁷⁸ and its local counterparts, referred to as the local AIC.⁷⁹

III. ANALYSIS OF FCPA ENFORCEMENTS IN CHINA

China's rise as a global economic power means that more DOJ and SEC enforcement actions will likely involve MNCs doing business in China.

The rise in China-related FCPA enforcement actions in 2016 appears to be due to (i) China's size (both as a matter of geography and population); (ii) China's role in the global economy; (iii) the similarity between bribery schemes arising out of China (i.e. gifts, travel, and entertainment); and (iv) the fact that many China-related bribery schemes involved the same industry (i.e. the healthcare and life science sectors).⁸⁰

Meanwhile, several other factors coalesce to make China an environment in which FCPA violations are likely to occur on a frequent basis.

A. Business Culture in China

The nature and development of business culture in China is deeply rooted in its unequal historical tradition and relates back to the Confucian concept of social hierarchy.⁸¹ Confucianism defines individuals by their

76. See *supra* Section II.A.

77. *Id.*

78. *Id.* The SAIC is a central government ministry directly under the State Council. It is responsible for market supervision and regulation, and related law enforcement through administrative means (in particular it enforces the AUCL). The SAIC regulates the areas of business registration, competition, consumer protection, trademark protection and economic crimes. It also co-ordinates the local AICs at or below the provincial level.

79. *Cf. id.*

80. *FCPA Digest Cases and Review Release Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, SHERMAN & STERLING (Jan. 2017), <https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/01/FCPA-Digest--January-2017--50217.pdf?la=en&hash=DC2607C9DD46543A437466FB777343EA89379DD5> [https://perma.cc/BL63-B9HT].

81. For more background information, see generally Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 460, 477-79 (2003).

families and social networks.⁸² The definition—or more precisely, structure—of family in China is much broader than that observed in the West.⁸³ Businesses in traditional Chinese culture, consequently, did not operate independently of family and social relationships.⁸⁴ In fact, familial relationships take precedence over contractual ones.⁸⁵ The emphasis on special relationships, particularly in the business context, can ultimately lead to bribery and corruption as businesses and government officials seek to exploit their networks to gain private advantages.⁸⁶ These practices, which date back hundreds of years, are so ingrained that they will be difficult to change without a strong political will on the part of the Chinese government and changes in popular attitudes among the Chinese business community. Thus, Confucianism is wholly inconsistent with the goals of the FCPA.

B. Economic System in China

Since China's economic reforms began in 1978, the role of state-owned entities (SOEs) in the economy has decreased: in 2015, the share of SOEs in comparison to the total GDP declined to less than 30%, while the share of non-state owned organizations increased to about 70% of the total GDP.⁸⁷ In contrast to the declining dominance of SOEs, the non-state sector became significantly more dynamic and is now the main source of employment and innovation: it accounted for approximately 78% of total employment and over 70% of expenditures in research and development in 2015.⁸⁸ Nevertheless, many important sectors of the economy continue to be controlled by SOEs, including banking, oil, and gas production and exploration, steel

82. Piero Tozzii, Note *Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?*, 64 FORDHAM L. REV. 1193, 1199 (1995).

83. See *id.* (“Confucianism is concerned with the moral cultivation of the individual, who exists not as a solitary creature, but as family member, friend, and subject . . . Undergirding all society is the family.”).

84. Cf. *id.* at 1200.

85. See *id.*

86. See, e.g., Miceala Tucker, “Guanxi!” - “Gesundheit!” *An Alternative View on the “Rule of Law” Panacea in China*, 35 VT. L. REV. 689, 690, 696, 700 (2011).

87. See National Bureau of Statistic of China, *China Statistical Yearbook 2016*, Index 1–8 (2016), <http://www.stats.gov.cn/tjsj/ndsj/2016/indexeh.htm> [<https://perma.cc/MN9Y-4MTL>].

88. See, e.g., *id.* at Index 4-1 and 20-1.

production, telecommunications, electricity and water supply, and transport.⁸⁹ Most hospitals in China are also operated by the state.⁹⁰

SOEs are utilized and managed at the central, provincial, and local levels—the latter two usually face increasing competition in the domestic market. In fact, the number of central SOEs, that is, those managed by the State-Owned Assets Supervision and Administration Commission (SASAC),⁹¹ steadily decreased from 152 in 2007⁶ to 102 in 2016,⁹² and to 96 at the end of 2017.⁹³

Chinese SOEs often behave as independent entities. Over the years, SOEs began to compete against each others, even in sectors where centralized SOEs have enjoyed relative dominance, such as petroleum extraction, telecommunications, and financial sectors. As a consequence, these firms also face increasing competition in the domestic market from both domestic and foreign-invested private firms.

Though certainly not complete, and not without periodic setbacks and retrenchments, SOEs overall have shifted toward both a greater commercial orientation based on market forces and the adoption of professional management systems and standards more akin to internationally accepted practices. However, on balance, SOEs do remain instruments of national policy, and this dual role as government entities and profit-seeking firms can create ongoing confusion and tensions, both domestically and abroad.⁹⁴ The next sections will illustrate these tensions and inconsistencies.

C. Difference Between China's Anti-Bribery Laws and the FCPA⁹⁵

Many differences exist between China's domestic laws against commercial bribery and the FCPA, and a transaction that violates the FCPA under the

89. See, e.g., *id.* at Index 13-2.

90. *Id.* It impacts the classification of employees (state v. non-state personnel) for the purposes of interpreting anti-bribery provisions: see *infra* Section III.C.2.c.

91. SASAC perform the investor's responsibilities supervises and manages the state-owned assets of the enterprises under the supervision of the Central Government, enhances management of the state-owned assets. See SASAC (explaining the SASAC's role in China), http://en.sasac.gov.cn/2018/07/17/c_7.htm [perma.cc/5PBS-SRE8].

92. Zhiting Chen, Governing Through the Market: SASAC and the Resurgence of Central State-Owned Enterprises in China, 166–67 (Sept. 2017) (unpublished Ph.D. thesis, University of Birmingham) (on file with the University of Birmingham).

93. See SASAC, Central Enterprise Directory, <http://www.sasac.gov.cn/n2588035/n2641579/n2641645/index.html> [perma.cc/75GS-9S9G].

94. China Institute, University of Alberta, *State-Owned Enterprises in the Chinese Economy Today: Role, Reform and Evolution*, 1, 18 (2018), <https://cloudfront.ualberta.ca/-/media/china/media-gallery/research/policy-papers/soepaper1-2018.pdf> [https://perma.cc/9CBV-EAQ6].

95. This Article focuses on the issues within the scope of Chinese criminal law and does not discuss accounting provisions within China's company law and securities law.

aggressive interpretations of DOJ could constitute only a violation of China's AUCL,⁹⁶ even if the transactions does not amount to a crime.⁹⁷ This section analyzes two problematic areas under the FCPA: (1) the broad definition of a "foreign official" and (2) the proscription of giving "anything of value."

1. Foreign Official as an Employee of a SOE Under the FCPA

a. Definition

Who constitutes a "foreign official" has long been debated, particularly whether employees of state-owned entities qualify as such. The FCPA designates a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."⁹⁸ The DOJ has stated that because SOEs or state-controlled enterprises are instrumentalities of the state, any employee of such an enterprise qualifies as a "foreign official" under the FCPA.⁹⁹ The FCPA Resource Guide promulgated by the DOJ states that the term "instrumentality" is broad and can include state-owned or state-controlled entities.¹⁰⁰ Whether a particular entity constitutes an "instrumentality" under the FCPA requires a fact-specific analysis of the entity's ownership, control, status, and function.¹⁰¹ The generic concept of "instrumentality" remains undefined.¹⁰² For the first forty years after the FCPA was enacted, not a single court of appeals was tasked with clarifying the meaning of this elusive, yet fundamental, term.¹⁰³

b. Enforcement Actions with Regards to a Foreign Official

As of today, only a few defendants have challenged whether a state-owned corporation can qualify as an instrumentality of a foreign government and each time, the court agreed with the DOJ's interpretation that it can qualify as such.

96. See *supra* Section II.A.2. *Commercial Bribery*.

97. China Institute, University of Alberta, *supra* note 94.

98. 15 U.S.C. § 78dd-1(f)(1)(A).

99. Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 916 (2010).

100. FCPA Resource Guide, *supra* note 4, at 20.

101. *Id.*

102. *Esquenazi v. United States*, 752 F.3d 912 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 293 (Oct. 6, 2014) (No. 14-189), 2014 U.S. S. Ct. Briefs LEXIS 2855 at 11.

103. See *id.*

In *United States v. Carson*, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011),¹⁰⁴ the DOJ charged various defendants with making bribes to employees of a number of state-owned companies in China and other countries, including the China National Offshore Oil Corporation, China Petroleum Materials and Equipment, Dongfang Electric Corporation, Guohua Electric Power, Jiangsu Nuclear Power Corporation, and PetroChina. The defendants moved to dismiss the indictment on the ground that a state-owned corporation, as opposed to a government bureau or agency, cannot be an instrumentality of the state and therefore employees of such corporations cannot be foreign officials. In *Carson*, the federal district court, like the other courts that have considered this issue, denied a motion to dismiss. The court held that some state-owned companies and business entities may be “instrumentalities” of the foreign government within the meaning of the FCPA. The court held that whether a company qualifies as an instrumentality is a question of fact. Government ownership of a company alone does not automatically make the company an instrumentality of the government, and other factors must also be considered. The court sets forth the following factors:

1. The foreign state’s characterization of the entity and its employees;
2. The foreign state’s degree of control over the entity;
3. The purpose of the entity’s activities;
4. The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
5. The circumstances surrounding the entity’s creation; and
6. The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

The court noted that these factors were not exclusive and that none of them was dispositive. State ownership was merely one consideration in deciding whether a state-owned company constituted an “instrumentality.” The court denied the defendants’ motion to dismiss on the grounds that the determination of whether the Chinese companies were instrumentalities of the state had to be made at trial.¹⁰⁵

In another case, *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), the Court of Appeals for the Eleventh Circuit set forth the meaning of “instrumentality” under the FCPA in a test determining when the executives and employees of a government-owned or a government-controlled company can be considered foreign officials.¹⁰⁶ The defendants in *Esquenazi* were co-owners of Terra Telecommunications Corporation, an American corporation, which purchased phone time from Telecommunications D’Haiti, S.A.M (Tele Co), the monopoly phone company in Haiti, to resell to customers in the United States.¹⁰⁷ The defendants arranged to make “side payments” to Tele Co executives to reduce debts that Terra Telecommunications

104. See *United States v. Carson*, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011).

105. Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 573 WIS. L. REV. 573, 578–79 (2012).

106. *Esquenazi*, 752 F.3d at 925.

107. *Id.* at 917.

Corporation owed to Tele Co.¹⁰⁸ The United States alleged that Tele Co was an instrumentality of the Haitian government, and therefore its executives were considered “foreign officials” under the FCPA definition.¹⁰⁹ The *Esquenazi* court determined that whether a SOE can be considered an instrumentality of a foreign government must be answered on a case-by-case basis, and it developed control and function tests intended to be “helpful” but “non-exhaustive” guidelines for determining such.¹¹⁰ The two-prong control and function inquiry asked whether the entity was controlled by a foreign government and whether the entity performed a function the controlling government treats as its own.¹¹¹

Under the first prong, the court articulated that control is evaluated by considering: (1) whether the entity has been formally designated as government controlled; (2) whether the government has a majority ownership stake in the entity; (3) whether the government has the ability to select management; (4) whether the government retains profits and covers shortfalls.¹¹²

To determine whether a state-owned entity performs a function the controlling government treats as its own under the second prong, the court set forth various factors, including whether: (1) the entity has a monopoly; (2) the government subsidizes the entity’s operations; (3) services are provided by the entity to the public in the country of ownership; (4) the public and the government of that foreign country generally perceive the entity to be performing a governmental function.¹¹³

On the facts of *Esquenazi*, the court held that Tele Co was a government entity because the Haitian government owned a majority interest of the company, provided the company with extensive tax advantages, appointed the Director General, and essentially gave Tele Co monopoly power over telecommunication services.¹¹⁴ Based on these facts, the Court of Appeals for the Eleventh Circuit held that Tele Co was an instrumentality controlled by the Haitian government, and therefore employees of Haiti Tel Co were “foreign officials” under the FCPA, and so the defendants’ improper payments to Haiti Tel Co employees violated the FCPA.¹¹⁵

108. *Id.* at 918.

109. *Id.* at 917.

110. *Id.* at 929.

111. *Id.* at 925.

112. *Id.*

113. *Id.* at 926.

114. *Id.* at 929.

115. *Id.* at 932.

Although the court purported to define “instrumentality” with an eye towards helping companies and regulators determine which SOEs fall within the FCPA’s reach, it ultimately provided unwieldy guidelines that lower courts were unlikely to refine. In *Esquenazi*, the court’s malleable, fact-intensive “instrumentality” test was too impracticable to provide real guidance to the business community and FCPA regulators.¹¹⁶

c. Doctors and Administrators in State-Owned Hospitals

U.S. officials define “foreign official” broadly enough to include doctors employed by state-owned hospitals and who thus may fall under the definition of an SOE instrumentality.¹¹⁷ Doctors, nurses, administrators, and other employees at state-operated hospitals (considered instrumentality of the state), could qualify as foreign officials under the DOJ’s interpretation.¹¹⁸ In recent years, the DOJ and the SEC have investigated many FCPA cases that involved payments to doctors and hospital administrators in the state-owned hospitals, such as AGA Medical,¹¹⁹ Diagnostic Products Corp.,¹²⁰ and Bristol-Myers Squibb.¹²¹

2. State Personnel Under Chinese Criminal Law

a. Definition

According to Article 93 of Chinese criminal law, the term “state personnel” or state functionary means any of the following: a person who performs

116. See *United States v. Esquenazi: Eleventh Circuit Defines “Government Instrumentality” Under the FCPA*, 128 HARV. L. REV. 1500 (2015), <https://harvardlawreview.org/2015/03/united-states-v-esquenazi/> [<https://perma.cc/8Q5B-KDN7>].

117. U.S. authorities argue that “[b]ribes to public doctors can have a detrimental effect on the public health care systems that potentially pay more for products procured through greed and corruption.” See *SEC Charges Johnson & Johnson with Foreign Bribery*, U.S. SEC. AND EXCHANGE COMMISSION (Apr. 7, 2011), <https://www.sec.gov/news/press/2011/2011-87.htm> [<https://perma.cc/36QS-9S3D>].

118. *DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act*, DEP’T OF JUST. (May 20, 2005), https://www.justice.gov/archive/opa/pr/2005/May/05_crm_282.htm [<https://perma.cc/TKY3-7BHM>].

119. *AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations*, DEP’T OF JUST. (June 3, 2008), <https://www.justice.gov/archive/opa/pr/2008/June/08-crm-491.html> [<https://perma.cc/6N26-ZT6T>].

120. *In re Diagnostic Products Corp.*, Securities Exchange Act of 1934 Release No. 51724 (May 20, 2005), <http://www.sec.gov/litigation/admin/34-51724.pdf> [<https://perma.cc/2YET-XCAB>]; *DPC (TianJing) Ltd. Charged with Violating the Foreign Corrupt Practices Act*, DOJ Press Release (May 20, 2005), available at https://www.justice.gov/archive/opa/pr/2005/May/05_crm_282.htm [<https://perma.cc/97UN-73SA>].

121. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Bristol-Myers Squibb With FCPA Violations (Oct. 5, 2015) (on file with author).

public duties at any state agency, i.e. legislative, administrative or judicial bodies or in the military; a person who is engaged in public service at a SOE, a people's organization, or a state institution; an employee assigned by a state agency, a SOE or an institution to a company, enterprise or institution that is not owned by the state but carries out public service or any other person who performs public services in accordance with the law.¹²²

b. State Personnel and Non-State Personnel in SOEs

The FCPA and Chinese criminal law are consistently classifying people as government officials under Chinese criminal law, from officials and retired officials working for Chinese government branches to their close relatives or any other person who has a close relationship with these officials.¹²³

However, the FCPA and Chinese criminal law differ in how they define SOEs officials and executives.¹²⁴ The FCPA broadly applies to corrupt payments to both SOEs low-ranking employees and high-level officials.¹²⁵ The Chinese NPC, on the other hand, held that performing public duties

refers to the duties of performing organization, leadership, supervision, and management duties on behalf of state organs, state-owned companies, enterprises, institutions, and people's organizations. [Public] duties are mainly [manifested in] public affairs linked to the authority and the [official] activities to supervise and manage state-owned property. [For example] . . . the staff of state organs perform their duties according to the law, [and] the directors, managers, supervisors of state-owned companies . . . manage and supervise state-owned property and other . . . [These activities correspond to performing public services. And those activities of] labor services and technical services . . . [in state-owned enterprises] are generally not considered [as activities of performing public services].¹²⁶

Therefore, Chinese criminal law classifies personnel of SOEs into two categories based on whether they perform public services: the first category encompasses personnel engaged in public management functions, specifically duties such as performing organization, leadership, supervision, and management,¹²⁷ i.e., those personnel providing public services or performing

122. Chinese criminal law, art. 93.

123. See *supra* note 49.

124. Compare FCPA, with Chinese criminal law, art. 93.

125. FCPA Resource Guide, *supra* note 4, at 20.

126. See Sup. People's Ct., Minutes of the National Symposium on the Trial of Economic Crimes in Courts, (Nov. 13, 2003), http://www.law-lib.com/law/law_view.asp?id=82074 [<https://perma.cc/S4KT-DP3X>].

127. *Id.*; see also SUN GUO XIANG, THE DOCTRINE AND SOLUTION OF BRIBERY CRIME, LAW PRESS OF CHINA 278–79 (2012).

public functions in state-owned enterprises.¹²⁸ The second category includes business or technical personnel and laborers who are engaged in specific work in SOEs (the Chinese judiciary also tries bribery crimes in accordance with this principle).¹²⁹ The Chinese SPC found that the first category of employees usually consists of high-level officials who were state personnel and have committed the crime of accepting bribes, also known as public sector bribery.¹³⁰ The Chinese SPC found that the second category usually consists of low-ranking employees who are not state personnel but who are also liable for the crime of accepting bribes when they accepted bribes from state personnel, and the offence is known as commercial bribery.¹³¹ For example, in one influential anti-corruption case, a Chinese court sentenced the former chairman of China Construction Bank to fifteen years in prison for accepting over \$500,000 in bribes from the companies IBM and NCR.¹³² The court found that Zhang who was a senior manager of a state-owned bank accepted bribes and was sentenced to prison.¹³³

c. Doctors and Administrators in State-Owned Hospitals

Most doctors in China work for state-owned hospitals, and state-owned hospitals deliver medical services to the majority of the Chinese population; the same anti-bribery principles apply to state-owned personnel as explained in a 2008 opinion of the Supreme People's Court (SPC) and of the Supreme People's Procuratorate (SPP) :

Where any State functionary in medical institutions, are involved in the activities of purchasing medical products such as medicines, medical equipments, medical health materials, etc., and take advantage of his/her position to extort money or property from the seller, or illegally accept the seller's money or property in return for benefits to the seller, which constitutes a crime, he or she

128. See CHEN HONG BING(陈洪兵), *THE DILEMMA AND OUTLET OF JUDICIAL DETERMINATION OF STATE PERSONNEL (国家工作人员"司法认定的困境与出路)*, 44 *Oriental Law* .112(2015), <https://sls.org.cn/moxing/orientalsTwo.html?id=8848> [<https://perma.cc/H4H2-KLXJ>].

129. Minutes of the National Symposium on the Trial of Economic Crimes in Courts, *supra* note 127.

130. See *id.* (finding that the people involved are usually those performing leadership, supervision, and management duties).

131. 最高人民法院、最高人民检察院关于办理商业贿赂刑事案件适用法律若干问题的意见 [Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery] (promulgated by the Supreme People's Court; Supreme People's Procuratorate, Nov. 20, 2008, effective Nov. 20, 2008).

132. David Barboza, *IBM, NCR and Hitachi cited in bribery verdict*, N.Y. TIMES, (Oct. 30, 2006), <https://www.nytimes.com/2006/11/30/business/worldbusiness/30iht-bank.3731302.html> [<https://perma.cc/8Z6F-MCDD>].

133. *Id.*

shall be convicted of accepting bribes in accordance with the provisions of Article 385 of the Criminal Law and punished accordingly.

Where any non-State functionary in medical institutions conducts any of the acts of the preceding paragraph with the amount being relatively large, he or she shall be convicted of accepting bribes by non-State functionary in accordance with the provisions of Article 163 of the Criminal Law and punished accordingly.¹³⁴

Therefore, Article 163 punishes non-state officials, such as hospital staff members, for bribery if they demand free products from hospital suppliers by taking advantage of their position.¹³⁵ Bribery also exists when medical personnel accept large amounts of products from the seller to the seller's benefit.¹³⁶ Article 385 similarly punishes state-officials such as hospital administrators.¹³⁷

d. GSK Case in China

The GlaxoSmithKline's (GSK) investigation and the subsequent conviction for bribery is a leading case.¹³⁸ Following allegations of widespread bribery in June 2013, GSK's former China executive, Mark Reilly, hired investigator Peter Humphrey and his wife Yu Yingzeng to conduct an internal investigation that did not find any evidence of corruption or bribery.¹³⁹ Chinese officials began a separate investigation one month later and accused GSK's senior executives of using travel agencies to offer kickbacks to government officials, hospitals, and doctors to sell more drugs at higher prices.¹⁴⁰ Chinese authorities accused GSK of paying \$482 million in bribes to health officials and doctors to boost sales.¹⁴¹ In 2003, China's Ministry of Public Security stated that

134. Opinions of the SPC and the SPP, *supra* note 131.

135. *Id.*

136. *Id.*

137. *Id.*

138. Laurie Burkitt & Jeanne Whalen, *China Targets Big Pharma; GlaxoSmithKline Hit With Bribery Allegations as Health-Care Sector Soars*, WALL ST. J., July 16, 2013, (<http://www.wsj.com/articles/SB10001424127887323664204578607502156860618>) [<https://perma.cc/2DZR-35HL>].

139. Hester Plumridge, *GlaxoSmithKline Found Guilty of Bribery in China U.K Drug Maker Handed Largest Ever Corporate Fine in China*, WALL ST. J., Sept. 19, 2014, <https://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-411114817> [<https://perma.cc/44V7-A73B>].

140. David Barboza, *Glaxo Used Travel Firms for Bribery, China Says*, N.Y. TIMES, July 16, 2013, at Section B.1.

141. NYT Report: GSK ignored whistleblower who reported China fraud and bribery, GAN Business Anti-Corruption Portal (Nov. 3, 2016), <https://www.ganintegrity.com/>

GSK had used 700 travel agents to deliver the illegal payments since 2007.¹⁴² After a secret one-day trial, the court imposed a fine of approximately \$500 million on the company and sentenced five GSK company managers, including Reilly, to potential prison terms of up to four years for bribing nongovernmental officials, i.e. non-state personnel.¹⁴³ GSK made a statement taking full responsibility for its actions, but it did not make a statement regarding bribing government personnel due to the sensitivity of the topic.¹⁴⁴ The Chinese government expelled Reilly, a British national, from China after his four-year suspended prison sentence.¹⁴⁵ The court gave Reilly a more lenient sentence because he voluntarily returned to China, assisted with the investigation, and confessed to bribery.¹⁴⁶

But the case did not end then: on September 30, 2016, GSK paid a \$20 million civil penalty to settle the charge that it violated the FCPA when China-based subsidiaries spent millions of dollars on pay-to-prescribe schemes for several years to pump up sales.¹⁴⁷ The FCPA offenses spanned from at least 2010 to 2013 and involved gifts, improper travel and entertainment with little to no educational purpose, shopping excursions, family and home visits, and cash.¹⁴⁸ The costs associated with these payments were recorded in GSK's books and records as legitimate expenses, for instance as medical association sponsorships, employee expenses, conferences, speaker fees, and marketing costs.¹⁴⁹ The SEC's order found that GSK violated the FCPA books and records, and internal controls provisions.¹⁵⁰ In a statement, GSK said the DOJ "has also concluded its investigation into these matters and will be taking no further action."¹⁵¹

Because both Chinese and U.S. law enforcement agencies investigated and punished GSK, this case provides a very valuable perspective to compare the differences between the two jurisdictions' laws and to analyze the different recognition criteria of the demand-side and the different perceptions of social harms. According to Chinese criminal law, business and technical

portal/news/nyt-report-gsk-ignored-whistleblower-who-reported-china-fraud-and-bribery/ [https://perma.cc/2K4N-PX4B].

142. *Id.*

143. Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html> [https://perma.cc/3AGF-4RV9].

144. Plumridge, *supra* note 139.

145. *Id.*

146. *Id.*

147. Cassin, *supra* note 28.

148. *Id.*

149. GlaxoSmithKline plc, Securities Exchange Act Release No. 79005, (Sept. 30, 2016) (order instituting cease-and-desist).

150. *Id.*

151. *See* Cassin, *supra* note 28.

personnel or employees who are engaged in specific work in SOEs are non-state personnel.¹⁵² Because doctors in state-owned hospitals only provide medical services to patients and do not perform public duties, they are considered non-state personnel. Acceptance of bribes is mainly attributable to their personal actions and does not impair the public management functions of the government. Accordingly, when they are punished, they are punished for violating the crime of accepting bribes as non-state personnel. Conversely, hospital administrators are the executors of the government's public health program, and their bribery acts undermine the public management functions of the government. However, the FCPA does not distinguish between the two types of personnel; they are defined simply as "foreign officials."¹⁵³ Because state-owned hospitals are the main providers of public medical services in China and because of the nature of doctors' work, the identification of doctors in Chinese criminal law is more consistent with the principle of proportionate punishment than it is in the FCPA.

In the *GSK* case, the DOJ did not directly participate in the investigation.¹⁵⁴ Rather, the SEC found that GSK violated the FCPA's accounting provisions.¹⁵⁵ Because of that, the company escaped criminal punishment for the same bribery that it was punished for under Chinese anti-bribery laws.

In contrast, many similar cases investigated by the DOJ considered doctors or administrators at state-operated hospitals to be "foreign officials" under the FCPA.¹⁵⁶ In some instances, the FCPA agencies used the same accounting provisions to prosecute cases that apparently began as bribery investigations; however, they were unable to satisfy the bribery provision's jurisdictional requirements or found it was less than certain who had received the improper payment.¹⁵⁷ Consequently, the DOJ's aggressive interpretation could significantly expand the number of persons who qualify as foreign officials and this ultimately would increase the compliance risk of MNCs doing business in China.

Another problem that cannot be ignored is the lack of cooperation between the two countries in anti-bribery cases. This lack of cooperation has inevitably

152. Opinions of the SPC and the SPP, *supra* note 131 (The term employees of a company or enterprise or any other entity as mentioned in Articles 163 and 164 of the Criminal Law shall include the non-state personnel in a state-owned company or enterprise or any other state-owned entity.).

153. *Supra* note 122.

154. Exchange Act Release No. 79005, *supra* note 149.

155. *Id.*

156. *See* Burkitt & Whalen, *supra* note 138.

157. *Id.*

weakened the international community's efforts to combat transnational bribery. Objectively speaking, this does not make for good policy.

3. *"Anything of Value" Under the FCPA*

a. *Definition*

The FCPA only prohibits U.S. companies from bribing foreign officials with "anything of value" for the purpose of obtaining or retaining business but "anything of value" is not defined in the FCPA and, for this reason, liability could theoretically stem from the exchange of a single dollar.¹⁵⁸ In the DOJ's non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs), the term "anything of value" has been broadly explained to include not only monetary payments, but also gifts, entertainment, meals, transportation, lodging, and a promise of future employment.¹⁵⁹ In FCPA cases involving China, paying for executive training programs at U.S. universities for Chinese foreign officials was found to be a potential FCPA violation when the programs did not specifically relate to the company's products or business.¹⁶⁰ Other possible examples of "anything of value" could include payment for tuition for educational opportunities for Chinese officials or offering paid internships to their children;¹⁶¹ the SEC brought charges for payments including sightseeing trips in the United States for Chinese officials who went to places such as Disneyworld, the Grand Canyon, and Las Vegas.¹⁶² Perhaps the broadest interpretation of "anything of value" occurred in two cases that involved charitable donation and employment opportunities.¹⁶³

b. *Enforcement Actions with Regards to Things of Value*

In the case against *Nu Skin Enterprises, Inc.*, Exchange Act Release No. 34-78884, 2016 WL 5044821 (Sept. 20, 2016) (Nu Skin), a Utah-based personal care company attempted to avoid sanctions from the Chinese Administration

158. SEC v. Dow Chemical Co., No. 3-12567, at 4 (D.D.C. 2007) (The government pursued Dow Chemical where many of the individual payments amounted to less than \$100 each).

159. United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991) (regarding airline tickets).

160. Complaint at 16–18, SEC v. UTStarcom, Inc., No. CV 09-6094 (N.D. Cal. Dec. 31, 2009), <https://www.sec.gov/litigation/litreleases/2009/lr21357.htm> [<https://perma.cc/3U98-5UR5>].

161. E.g., *infra* note 167.

162. See Complaint at 11, SEC v. Lucent Tech. Inc., No. 1:04-cv-01141 (D.D.C. Dec. 21, 2007), <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf> [<https://perma.cc/6LFV-7H2H>].

163. See *In re Nu Skin Enter.*, Exchange Act Release No. 34-78884, 2016 WL 5044821 at *2–3 (Sept. 20, 2016).

for Industry and Commerce (“AIC”) by seeking favors from a high-ranking Communist party official.¹⁶⁴ Nu Skin allegedly made a significant monetary contribution to a charitable organization controlled by that same official and assisted the official’s child in obtaining college letters of recommendation from an “influential U.S. person.”¹⁶⁵ In exchange, Nu Skin asked the official to persuade the AIC not to issue a fine, and as a result, AIC later dropped its investigation of Nu Skin.¹⁶⁶ Nu Skin has agreed to pay \$765,688 to settle charges alleging that it violated the internal controls and books-and-records provisions of the FCPA in connection with a charitable donation.¹⁶⁷ The SEC interpreted in the case against Schering-Plough Corporation that donations to a charity which provided a foreign official with an intangible benefit fell within the scope of “anything of value.”¹⁶⁸

In a 2015 case, the DOJ and the SEC opened a bribery investigation and looked into JP Morgan’s (JPMorgan) hiring practices in China where the bank allegedly offered employment to the Chinese officials’ and executives’ children in return for profitable investment-banking assignments that the Chinese government officials could offer to the bank.¹⁶⁹ Such recruitment and employment was allegedly linked to winning initial-public-offering mandates, a particularly lucrative investment banking activity.¹⁷⁰ Under the client referral hiring program, which allegedly ran from 2006 to 2013, JPMorgan took referrals from a broad spectrum of China’s business and political elite, including senior executives of major SOEs who then allegedly

164. *Id.*

165. *Id.*

166. See Michael J. Edney, Kevin J. Harnisch, Sun Hong, Wilson Ang, & Ilana Beth Sinkin, *SEC fines Nu Skin US\$765,688 to settle FCPA charges*, NORTON ROSE FULBRIGHT: PUBL’NS (Sept. 2016), <http://www.nortonrosefulbright.com/knowledge/publications/142830/sec-fines-nu-skin-us765688-to-settle-fcpa-charges> [<https://perma.cc/9DJZ-ALKC>].

167. See SEC. & EXCH. COMM’N, ADMIN. PROCEEDING FILE NO. 3-17556 (Sept. 20, 2016), <https://www.sec.gov/litigation/admin/2016/34-78884-s.pdf> [<https://perma.cc/N572-T7FU>].

168. See *In re Schering-Plough Corp.*, Exchange Release No. 34-49838, 2004 WL 1267922 (June 9, 2004).

169. Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, (Aug. 18, 2013, 8:01 PM), <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny> [<https://perma.cc/SB4X-DJYD>].

170. Emily Glazer, Michael Rothfeld, & Christopher Matthew, *Two J.P. Morgan Executives Connected to Asia Hiring Probe Pushed Out*, WALL ST. J. (Feb. 12, 2015, 11:00 PM), <http://www.wsj.com/articles/two-j-p-morgan-executives-connected-to-asia-hiring-probepushed-out-1423788737> [<https://perma.cc/J6FX-3TWQ>].

awarded public offering assignments to the bank.¹⁷¹ The investigative focus on JPMorgan's hiring practices was catalyzed by reports of hires that supposedly helped JPMorgan win investment-banking deals with a state-controlled financial firm, China Everbright Group, and with the state-controlled China Railway Group.¹⁷² This included nearly 100 candidates referred by foreign government officials to more than twenty different Chinese SOEs.¹⁷³ A number of the referral hires (222 were hired) resulted in business for JPMorgan.¹⁷⁴ The referring SOEs entered into transactions totaling more than \$100,000,000 in revenue for JPMorgan Asia-Pacific (APAC) or its affiliates during this period.¹⁷⁵ The JPMorgan resolutions, at least insofar as they are presented in the Order and NPA, clearly relate to *quid pro quo* hires for near-term expected business.¹⁷⁶ The SEC's order finds that JPMorgan violated the anti-bribery, books and records, and internal controls provisions of the Securities Exchange Act of 1934.¹⁷⁷ In 2016, JPMorgan agreed to collectively pay the DOJ, the SEC, and the Federal Reserve \$264.5 million and the DOJ went on to declare: "[a]warding prestigious employment opportunities to unqualified individuals in order to influence government officials is corruption, plain and simple. This case demonstrates the Criminal Division's commitment to uncovering corruption no matter the form of the scheme."¹⁷⁸

Although these cases involved books and records provisions' violations, the implication of the DOJ's and SEC's position was that charitable donation and employment opportunities satisfied the giving of "anything of value" element under the anti-bribery provisions of the FCPA.¹⁷⁹ The FCPA not only forbids the giving of money or property, but also the giving of "anything of value," a much broader term that encompasses indirect and intangible benefits.¹⁸⁰ These legal developments suggest that enforcement agencies are continuing to expand the FCPA's scope.

171. Ned Levin, *J.P. Morgan Hired Friends, Family of Leaders at 75% of Major Chinese Firms It Took Public in Hong Kong*, WALL ST. J. (Nov. 30, 2015, 8:45 PM), <http://www.wsj.com/articles/j-p-morgan-hires-were-referred-by-china-ipo-clients-1448910715> [<https://perma.cc/ZD6V-NEB4>]

172. Silver-Greenberg, *supra* note 169.

173. Credit Suisse AG., Exchange Act Release No. 83593 ¶ 3, 2018 WL 3302863 (July 5, 2018)(order instituting cease-and-desist).

174. Levin, *supra* note 171.

175. Press Release, U.S. Sec. and Exch. Comm'n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016) (on file with author), <https://www.sec.gov/news/pressrelease/2016-241.html> [<https://perma.cc/98JT-LWTV>].

176. JPMorgan Order, Securities Exchange Act Release No. 79335, (Nov.17, 2016) (on file with author), ¶¶ 23, 39, 43 (order instituting cease-and-desist).

177. *Id.*

178. *Id.*

179. *See id.*

180. 5 U.S.C. § 78dd-1(a) (1998).

4. Money or Property Under Chinese Criminal Law

a. Definition

Article 385 of Chinese criminal law prohibits the giving of “money and thing (property)” to state personnel.¹⁸¹ A separate provision creates a duty on a state personnel to identify the sources of his property.¹⁸² Article 395 of Chinese criminal law provides that where the property or expenditure of any state personnel obviously exceeds his legitimate income, and the difference is huge, then the individual shall be ordered to explain the sources.¹⁸³ If the individual fails to do so, the difference shall be determined as illegal income.¹⁸⁴

This provision is designed to create a duty for officials to account for levels of wealth that appear to exceed their lawful sources of income, and to deter Chinese state officials from flaunting their illegally acquired wealth.¹⁸⁵ The Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) described this interpretation in the following opinion:

The property shall include not only money and property in kind, but also property benefits, the value of which may be calculated in money, [including] provision of housing decoration, membership cards containing money, token cards (money) and travel expenses. The specific amounts shall depend on the actually paid costs and expenses.¹⁸⁶

Chinese authorities typically require that corrupt payments or benefits exceed RMB (renminbi) 30,000 (\$4,286) in value in order to incur criminal liability under Chinese laws, although authorities may bring enforcement actions for payments or benefits that exceed RMB 10,000 (\$1,429).¹⁸⁷

b. “Intangible Benefits” in China

The above provisions of Chinese criminal law focus on giving “money or property” or “property benefits” to government officials. In contrast, giving government officials intangible financial assets falls outside the

181. Chinese criminal law, art. 385.

182. *Id.* art. 395.

183. *Id.*

184. *Id.*

185. *See id.*

186. Opinions of the SPC and the SPP, *supra* note 131, at 7.

187. The Supreme People’s Procuratorate of the People’s Republic of China’s Interpretations, *supra* note 47.

scope of these laws and is therefore not prohibited.¹⁸⁸ Chinese law is so regulated for two reasons: first, criminal law norms should be clear and because the contents of intangible benefits are not certain, it is difficult to establish clear and specific criminal provisions; second, “money or property” can be easily accounted for.¹⁸⁹ Consequently, establishing clearer and more uniform penalties and operability is probably more feasible and it helps to maintain consistency in the scale of prosecution and judgment in the national judicial system.¹⁹⁰ Furthermore, another social reason that cannot be ignored resides in the fact that many people in China would find that an official did nothing ethically or legally wrong by asking a domestic corporation or a MNC to provide an internship for a child or a relative. Although providing such internship is lawful under the Chinese laws, it might be unlawful under the FCPA if the MNC receives business in return.¹⁹¹

China is a signatory of the United Nations Convention Against Corruption (UNCAC).¹⁹² In accordance with Article 15 of the UNCAC, a state party shall establish a criminal offense for bribing public officials with “undue advantage,” which includes more than just “money or property” and extends to intangible benefits.¹⁹³ Therefore, the Chinese “money or property” provision needs to be reformed to comply with the Convention, even if the current provision is the result of a choice based on realistic considerations.

188. See generally Zhao Binghi (赵秉志), *Zhong guo fan fu bai xingshi fa zhi de ruogan zhong da xianshi wen tianjiu* (中国反腐败刑事法治的若干重大现实问题研究) (Research on Some Major Realistic Problems of China's Anti-corruption Rule of Law).

189. See *id.* at 12.

190. See Gao Mingxuan & Zhang Hui, *On the “Scope” of Crime of Bribery*, L. SCI. MAG.1, 3 (2013).

191. *Supra* notes 173, 174.

192. *Supra* note 36. The UNCAC has 186 parties. It seeks to combat corruption by encouraging cooperation between participating countries and maintaining the ideals of fairness, responsibility, and equality. The main goals of the Convention are prevention, criminalization, international cooperation, and asset recovery.

193. G.A. Res. 58/4, United Nations Convention Against Corruption (Oct. 31, 2003), art. 15:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

D. The Dilemma of MNCs that Operate Businesses in China

Because of the differences between China's anti-bribery laws and the FCPA, FCPA compliance in China is a challenge for MNCs. Additionally, a high number of individuals in China could be considered foreign officials, and thus MNCs can trigger FCPA liability by offering anything of value to these individuals, whether it be gifts, charitable donations, or employment opportunities.

As it currently stands, FCPA issues involving China present a particularly thorny and elusive problem for MNCs. MNCs are caught between two extremes: a weak regulatory system in China that refuses to investigate these cases, and a fine-based scheme in the United States that is so harsh that regulators will most likely never be able to give the maximum penalties. These two systems are so different that they do not work together. Until they do, companies will be faced with the uncertainty of not knowing whether making a payment will incur liability.

IV. RECOMMENDATIONS

Everyone can agree that corruption is a major problem that has devastating financial and human costs. Corruption undermines the global economy, threatens national security, and destroys livelihoods.¹⁹⁴ The policy goal of the FCPA—to encourage U.S. companies to forge business relations abroad on the basis of ethical business practices—is a worthy one. The method of enforcement, however, undermines that goal. The following section provides three concrete recommendations that would benefit all parties.

*A. Design Compliance Procedures to Meet Both
U.S. and Chinese Requirements*

U.S.'s anti-bribery rules have broad extra-territorial jurisdiction and often affect MNCs operating in China.¹⁹⁵ Recently, Chinese authorities have also actively enforced domestic anti-bribery rules and these rules also extend China's extra-territorial jurisdiction, which could also affect MNCs

194. The World Bank estimates that about \$1 trillion is paid every year in bribes. *Lowering the Bar: How American Lawyers Told Us How to Funnel Suspect Funds into the United States*, GLOBAL WITNESS (Feb. 1, 2016), <https://www.globalwitness.org/en/reports/loweringthebar> [<https://perma.cc/5R78-HFGM>].

195. See *id.*

doing business outside of China.¹⁹⁶ As a result, MNCs operating in China face overlapping anti-bribery legal regimes that create new legal risks in other jurisdictions.

The distinctions between the two regimes mean that a company's compliance procedures designed under one set of rules may not be sufficient to address the company's risk of exposure under the other regime. This is particularly troublesome in the current enforcement environment, where white collar crime receives important government and media attention, and enforcement agencies in each jurisdiction monitor bribery developments in the other jurisdiction and where an investigation in one jurisdiction often leads to similar inquiries in the other jurisdiction.

Because law enforcement agencies in China and in the United States do not effectively cooperate on anti-bribery crimes, the best approach is to design compliance procedures that meet the requirements of both anti-corruption regimes. Western companies have experience meeting FCPA requirements, but MNCs must be aware of the problems unique to Chinese business culture.¹⁹⁷ It is conceivable that MNCs would have to pay huge compliance costs to achieve this goal.

B. Clarify the FCPA's Definition of "Foreign Official" and "Anything of Value"

The main problem with the FCPA is that it has not clarified the definitions of "foreign official" or "anything of value." The cultural variations between the two countries' business practices necessitate more comprehensive definitions.

Given the dominant role of SOEs in many nations, especially in East Asia, and the DOJ's interpretations of the FCPA, some U.S. corporations worry that "everyone they deal with is a foreign official because they work for an SOE."¹⁹⁸ As such, the FCPA statute should be amended to indicate to what extent government control will qualify a corporation as an instrumentality. In China, the distinction between the central SOEs and local SOEs is of practical significance. U.S. companies are strictly prohibited from providing anything of value, even in trivial amounts, that could be construed as intended to gain a business advantage.¹⁹⁹ This, however, does not take into account business courtesy and anti-bribery laws in China or

196. *Id.*

197. Such as risk assessment and analysis, regular training on internal anti-corruption rules, improving the work of the compliance department, establishing regular report system and perfecting the due diligence, etc.

198. See Declaration of Prof. Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One through Ten of the Indictment at ¶ 447, *United States v. Carson*, No. SA CR 09-00077-JVS, WL 12854892, (C.D. Cal. Feb. 21, 2011).

199. See generally 15 U.S.C. § 78dd-1(a) (1998) (discussing the extent of the prohibition).

East Asia area.²⁰⁰ The FCPA should be amended to allow for the type of gift-giving that is typical in many nations.²⁰¹ The FCPA includes the “facilitating payments” exception in the Act.²⁰² Excluding facilitating payments from the scope of the FCPA makes common sense and is certainly culturally consistent with western hemisphere business practices in Latin cultures, such as Mexico.²⁰³ In fact, it certainly “displayed a cultural sensitivity to business practices in the nation’s neighborhood with its close trading partners at the time.”²⁰⁴ Therefore, would it not be worthy to add another exception under the FCPA for deals with business in some Asian countries?

For these considerations, the FCPA should be amended to provide a clear definition of “foreign official,” of “instrumentality,” and of “anything of value.” Whether broad or narrow, the FCPA boundaries should be clearly established. Predictability and fair notice are particularly valuable to interpret a criminal statute that threatens individuals with incarceration for conduct that may constitute illegal corruption in some countries but standard business practice in others.²⁰⁵

C. Continue to Improve Chinese Anti-Bribery Law Framework

1. Amendment of Anti-Bribery Provisions

In order to effectively enforce conformity to domestic bribery standards,²⁰⁶ China should amend its existing criminal law to cover more activities. Because of the type of bribery often involved, China should gradually incorporate various intangible benefits into criminal law and expand the scope of bribery crimes. Rather than concentrating on deterring public officials from bribery, China can increase penalties to obtain an efficient balance between both the demand-side and the supply-side of bribery. Furthermore, these provisions should also conform to the requirements of

200. *Id.*

201. *Id.*

202. Michael S. Diamant & Jesenka Mrdjenovic, *Don't You Forget About Me: The Continuing Viability of the FCPA's Facilitating Payments Exception*, 73 OHIO ST. L.J. FURTHERMORE 19, 21–22 (2012).

203. See Michael P. Forrest & J.T. Norris, *Bribery and China Go Together Like Yin and Yang*, 44 CUMB. L. REV. 423, 423 (2013).

204. See *id.* at 431.

205. Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 234 (1999).

206. Chinese criminal law, arts. 392, 393, 398.

the UNCAC.²⁰⁷ To achieve long-term success, China must shift some of its focus to making widespread changes in its anti-bribery provisions.

2. Publish Guidance Concerning the Anti-Corruption Provisions in China

In order to develop a truly successful anti-corruption regime, China must increase transparency and implement strict enforcement mechanisms. Aware of the importance and necessity of independent investigative agencies, China adopted an independent agency (the SSC) to enforce its anti-corruption laws.²⁰⁸ Furthermore, the SSC should follow the DOJ's and the Serious Fraud Office's steps and publish guidance concerning the anti-corruption provisions of criminal law and AUCL.²⁰⁹ Although SASAC has issued a compliance approach that applies only to central enterprises, its content is too abstract and too general, and there are no specific requirements for direct anti-bribery actions.²¹⁰ Nonetheless, the guidance SASAC issued fully explains its decision-making process and lists types of practices that are unacceptable; it also provides clear guidelines that will allow companies to implement suitable compliance programs and promote self-regulation.²¹¹ This guidance will help maintain a balance between regulating both the supply and demand side of bribery and it will not only provide a valuable source of information for individuals and companies, but it will also help articulate and develop the anti-bribery provisions of Chinese criminal law.

3. Participate in International Cooperation with Foreign Countries

The OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 1997.²¹² The convention obliges parties to criminalize foreign public official bribery in international business transactions, outline criminal penalties for these violations, establish accounting provisions, and provide assistance to other signatories in investigations and proceedings against those charged with bribery.²¹³

207. UNCAC, *supra* note 36, art. 15 (providing each country should define bribery as "the promise, offering, or giving to a foreign public official . . . directly or indirectly).

208. Supervision Law, art. 3.

209. *See generally* FCPA Resource Guide, *supra* note 4.

210. SASAC, *supra* notes 91, 93.

211. *Id.*

212. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for the Economic Cooperation and Development (Dec. 17, 1997), 37 I.L.M. 1.

213. *Id.* arts. 1, 3, 8, & 9.

If China can join the OECD Convention, it would benefit its current anti-corruption work. The OECD Convention requires its members “to the fullest extent possible under its laws and relevant treaties and arrangements [to] provide prompt and effective legal assistance to another Party.”²¹⁴ Furthermore, “cooperation with other signatories and forced peer reviews may encourage other countries to aid China in fighting corruption in international business transactions.”²¹⁵ Hence, being a party to the convention will improve governmental coordination between countries to continuously ensure that China will receive aid in combatting the supply side of corruption.

Decades of international outreach and cooperation have played a crucial part in the expansion of FCPA enforcement. Multijurisdictional collaboration brings significant benefits to prosecutors and regulators combating international corruption . . . Three primary factors have contributed to this collaborative impact: First, years of relationship-building among international law enforcement is bearing more fruit . . . These long-cultivated relationships have facilitated recent investigations, allowing them to run more smoothly and efficiently. Further, the U.S. participation in multilateral for alike the Organization for Economic Cooperation and Development’s Working Group on Bribery has significantly helped advance the anti-corruption agenda across the globe, as well as multiplied and solidified the links among U.S. and foreign law enforcement, regulators and policymakers. . . . Second, cross-border connections have improved information sharing . . . This sharing speeds up the investigative process and helps countries develop stronger cases. . . . Third, more and more foreign authorities have become actively involved in anti-corruption enforcement. In the last two years alone, the DOJ and the SEC worked closely with foreign law enforcement to achieve record-breaking settlements with multiple multinationals. These collaborative efforts bolster the U.S. agencies’ track record of bringing bigger, harder-hitting cases alongside foreign authorities.²¹⁶

China has been the country with the largest number of FCPA cases in recent years, but there is no cooperation between Chinese and American law enforcement agencies, and China has not brought charges against SOEs and personnel involved in FCPA cases.²¹⁷

214. See *id.* art. 9.

215. Emily Tran, *Endemic Corruption in the People’s Republic of China*, 17 SAN DIEGO INT’L L.J. 295, 326 (2016).

216. Patrick Stokes & Zachariah Lloyd, *40 Years Of FCPA: Cross-Border Efforts and Growing Risk*, LAW360 (Dec. 2, 2017), <https://www.gibsondunn.com/wp-content/uploads/2017/12/Stokes-40-Years-Of-FCPA-Cross-Border-Efforts-And-Growing-Risk-Law360-12-12-2017.pdf> [<https://perma.cc/8C5D-BDY4>].

217. *Pfizer re-opens the bribery of foreign companies, Wyeth is accused of bribery*, SINA (Aug. 26, 2013, 4:18 PM), <http://health.sina.com.cn/news/2013-08-26/1618101232.shtml> [<https://perma.cc/W3JV-WVK2>].

Thus, this feels like a shortcoming in international anti-bribery cooperation and it should create an incentive for China to participate in international cooperation with other members of the UNCAC, as requires by the 1997 Convention. In order to encourage countries to help China track down corrupt officials who have fled the country with illegal assets, China has adopted a policy, common in many countries, to share up to 80% of seized assets from corrupt transactions.²¹⁸ On October 26, 2018, China adopted the International Criminal Justice Assistance Law of China,²¹⁹ which highlights China's efforts to strengthen international cooperation with other countries in the fields of investigation, prosecution, trial, and enforcement of criminal cases, especially those involving public sector bribery crimes.²²⁰

As the international enforcement of corruption cases increases, China cannot—and should not—be alone in fighting corruption. As a major economic player in world trade and investment, China has a responsibility to participate in the OECD Convention, to help other countries combat the spread of global corruption and to promote a fairer global economy.

Due to longstanding historical, cultural, and political traditions, eradicating corruption in China will no doubt be a slow process. Adopting more effective measures to do so will require changes in China's cultural, political, and legal framework, but will yield numerous benefits for China in the long term.

218. Cheng Muiyang, *China to Share Assets from Fugitives Abroad with Other Countries*, CHINADAILY.COM (Nov. 3, 2014, 11:22 AM), http://www.chinadaily.com.cn/china/2014-11/03/content_18856312.htm [https://perma.cc/4TT7-TTCH].

219. See *Zhōnghuámínguóguójìxíngshìfǎxiézhùfǎ* (中华民国国际刑事司法协助法) [Law of the People's Republic of China on International Criminal Justice Assistance] (promulgated by Standing Comm'n. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018).

220. See *id.* art. 2 ("For the purpose of this Law, international criminal justice assistance refers to the assistance provided by the People's Republic of China and a foreign country to each other in the activities such as investigation, detection, prosecution, adjudication and enforcement of criminal cases, including service of documents, arrangement for witnesses to give testimony or assist in investigation, sealing up, seizure and freezing of property involved in cases, confiscation and return of illegal gains and other property involved in cases, transfer for custody of sentenced persons and other assistance.").